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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 245

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A Corporation,

Petitioner,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION

JOHN J. NAUGHTON,
205 West Wacker Drive,
Chicago 6, Illinois,
Attorney for Certain Respondents.

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Respondents, Brotherhood of Railroad Trainmen, and W. E. Grady, T. R. McDermott, W. H. Starner and R. E. Dockendorf individually and as officers of the said Brotherhood of Railroad Trainmen and as representatives of the employees of Petitioner represented by the Brotherhood

of Railroad Trainmen (hereinafter designated as BRT) for Answer to the Petition for Writ of Certiorari say:

OPINIONS BELOW.

The opinion of the District Court is reported at 196 F. Supp. 158. The opinion of the Court of Appeals is reported at 302 F. 2d 545 (Appendix A to the Petition).

JURISDICTION.

The jurisdictional requisites are adequately stated in the Petition.

QUESTION PRESENTED.

Whether the Norris-LaGuardia Act prohibits a District Court from entering an injunction restraining a threatened strike pending appeal after a hearing on the merits has resulted in a determination that the District Court is without jurisdiction because a "labor dispute" exists.

STATUTES AND RULES INVOLVED.

Some of the pertinent provisions of the Norris-LaGuardia Act (47 Stat. 70, 29 U. S. C. 101 et seq.) are set forth in the Petition as Appendix B. Section 2 of that Act is pertinent and provides:

> "In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted."

In addition, Section 10 of that Act is also pertinent and provides:

> "Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeals shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character."

Rule 62(c), Fed. Rules of Civil Procedure is set out in the Petition (p. 3). Especially pertinent thereto are Rule 65(c) which in pertinent part provides:

> "These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee. . ."

and Rule 82, F. R. C. P., which provides:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States District Courts. . ."

STATEMENT.

This litigation concerns the efforts of the Petitioner to obtain an injunction pending an appeal in a "labor dispute" despite the fact that Petitioner lost on all issues after a full hearing on the merits. The ruling on the merits is the subject of a separate Petition for Writ of Certiorari. The instant Petition concerns the ruling of the United States Court of Appeals for the Seventh Circuit reversing the District Court judgment enjoining BRT and other respondents from striking pending the Petitioner's Appeal from the judgment on the merits.

The Petition adequately summarizes the District Court judgment. The reversal of that judgment by the Court of Appeals was based on the sole issue involved in this Petition: whether a District Court can issue an injunction pending appeal after concluding as a matter of law and after a hearing on the merits that the Norris-LaGuardia Act had divested it of jurisdiction to take any action restraining BRT and the other union defendants. The Court of Appeals answered this sole issue in the negative.

ARGUMENT.

This case involves an attempt by a railroad to obtain a temporary injunction after losing on the merits following a full hearing. On the merits, the District Court found, among other findings adverse to Petitioner, that it was divested of jurisdiction because a "labor dispute" existed within the meaning of the Norris-LaGuardia Act 47 Stat. 70, 29 U. S. C. § 101 *et seq.* Nonetheless, the District Court entered an injunction pending appeal finding ". . . the equities of the general public greater than those of the defendants." (App. 468). The Court of Appeals correctly reversed that judgment.

No question of importance is raised when the Norris-LaGuardia Act is interpreted so as to take the Courts out of the "labor injunction business" and especially when the Petitioner has been accorded an improvidently issued Temporary Restraining Order and a full hearing on the merits. No conflict is presented with other decisions of this Court or of Courts of Appeal. There is no important question of federal law when a Court of Appeals refuses to assert the divine right of government by the judiciary contrary to the plain meaning of the Norris-LaGuardia Act.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

The Court of Appeals carefully considered the briefs and arguments of the parties and its learned opinion discusses all of the pertinent cases, statutes, and rules. Petitioner begs the question when it asserts that the Norris-LaGuardia Act does not specifically state that it bars an injunction pending appeal. The intent of Congress was clearly to

take all the federal courts out of the labor injunction business. *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365, 369. No amount of tortured reasoning can obscure the correctness of the calm, dispassionate opinion below which recognizes the broad prohibition of labor injunctions which Congress carefully decreed and expressed throughout the Norris-LaGuardia Act. The Court of Appeals properly and explicitly rejected Petitioner's theory below that the injunction was warranted by Rule 62(c), Federal Rules of Civil Procedure. The analysis contained in the Opinion below is convincing because it is clearly correct.

II.

THERE IS NO CONFLICT OF DECISION.

Petitioner claims a conflict of decision based on an unessential citation in the Opinion. Moreover, the supposed conflict has to be tortured out of an accommodation of two major labor statutes passed contemporaneously as parts of a Congressional statement of labor policy. That case is no authority for asserting a compelled deference to the Federal Courts contrary to the Norris-LaGuardia Act. 47 Stat. 70, 29 U. S. C. 101 *et seq.*

III.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW TO BE DECIDED.

The decision below holds only that a railroad which cannot prove that the Norris-LaGuardia Act does not apply cannot obtain an injunction by appealing the trial court determination of lack of jurisdiction. Having lost in the trial

court, it must bear the consequences of that loss. This has always been the case when the union loses; it must bear the consequences of that loss. This is in accord with the intent of Congress which did not pass an act which would permit employers to exhaust unions by means of appellate procedures. No disorder is caused by such perfect equity and Congress, of course, intended a serious encroachment on the traditional exercise of federal judicial power (See Petition, p. 7). On the contrary, the position advocated in the Petition would stultify collective bargaining and require that all avenues of the law be exhausted before serious bargaining could begin.

There is no question of a supervision of the lower federal courts. This Court has clearly set out the general principles of Norris-LaGuardia and of the Railway Labor Act of 1926, 44 Stat. 577, 45 U. S. C. § 151 *et seq.*

No serious doubt exists as to the meaning of either Act. There is, therefore, no important question of federal law to be decided.

CONCLUSION.

Because of the applicable law and the demands of substantial justice, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN J. NAUGHTON,
205 West Wacker Drive,
Chicago 6, Illinois,
Attorney for Certain Respondents.

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OPINIONS BELOW.

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JURISDICTION.

The jurisdictional requisites are adequately stated in the Petition.

QUESTIONS PRESENTED.

1. Whether the Norris-LaGuardia Act prohibits the issuance of an injunction in a major dispute under the Railway Labor Act.

2. Whether the National Mediation Board has the power to impose a supermediation over the objection of the unions after that Board has previously mediated the same dispute and has notified the parties that it is terminating its services.

3. Whether Pension Plans are bargainable under the Railway Labor Act.

4. Whether Petitioner may raise a question of law as to bargaining for retired persons and as to the awarding of attorneys' fees to the respondents when the District Court found no such bargaining and further found that respondents were entitled to attorneys' fees by virtue of Section 7 of the Norris-LaGuardia Act.

STATUTES INVOLVED.

The pertinent statutes are adequately set forth in the Petition at page 3.

STATEMENT.

This case involves the request of BRT and the other union respondents for an improvement of an existing pension plan. Preceding the instant dispute, there were two previous plans in effect between the parties. The first of these plans expired on October 31, 1957 (App. 350-358, Finding of Fact No. 10, App. 453, 454). The second, commonly known as Plan H-B, was to expire on October 31, 1959 (App. 359-378, Finding of Fact No. 10, App. 453-454). On October 1, 1959, defendants sought changes in the pension plan by requesting such changes in a notice served in accordance with the provisions of Section 6 of the Railway Labor Act (App. 455).

When the Section 6 Notice was first discussed between the parties, defendants requested an extension of Plan H-B for a period of 30, 60, or 90 days. This was done because the various plans were adaptations for railroads of pension plans obtained by the United Steelworkers (App. 125, Finding of Fact No. 10, App. 454) and the Steelworkers at that time had not signed a new pension plan (App. 129). At those conferences, the defendants' request for extensions of the old plan was refused (App. 212).

The National Mediation Board took jurisdiction of the dispute on August 22, 1960. At the mediation conferences, copies of the latest non-contributory pension plans, Plan H-CR, were obtained by defendants and presented to Mr. Verd who refused to accept or to discuss them (Finding of Fact No. 12, App. 456). The Court found that Verd was of the opinion that he was not required to bargain, under the Railway Labor Act, about the defendants' proposed Pension Plan but that he did in fact bargain about the said Plan (App. 45).

In March 1961, the National Mediation Board terminated its services after defendants had declined to arbitrate the dispute between the parties (App. 300, 301).

Conferences were had in April without agreement. At the meeting of April 19, 1961, Mr. Verd offered to grant Plan H-CR if the defendants would agree that a cent and a half an hour or a flat $3 a month could be deducted from the wages of each man who worked. The defendants rejected this offer because of a belief that the E. J. & E. employees were being discriminated against since 5 other U. S. Steel railroads had obtained Plan H-CR without any cost to the employees (App. 100, 101).

A strike was authorized by the defendants for May 20, 1961 at 6:00 A. M. (App. 148). The National Mediation Board, on May 16, requested the defendants to defer the strike until further conferences were held (App. 14). The Mediation Board was advised that it was not necessary to defer the strike date. Mediator Rupp was told that some communication was desired as to whether the case was in mediation. That communication was then received and stated that the Board was not asserting jurisdiction under Sections 5 or 6 of the Railway Labor Act (App. 105, Finding of Fact No. 18, App. 458-460).

The Complaint and Answers were then filed and a hearing on the merits was had resulting in the Decree from which the railroad appealed. The Court of Appeals affirmed the decree (Appendix A to Petition).

ARGUMENT

This case involves the request of BRT and the other unions for a pension plan (commonly called H-CR) which provided more benefits than the pension plan (commonly called H-B) in existence by virtue of an agreement between the parties. This request for change clearly created a "major dispute" under the Railway Labor Act. The District Court's refusal of injunctive relief was clearly correct since such relief was prohibited by the provisions of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101 *et seq.* The Court of Appeals correctly refused to put the federal courts back into the labor injunction business. No supermediation by the National Mediation Board is, or could be, involved in this case. Pension Plans are bargainable items under the Railway Labor Act. This Court will not review questions which turn on whether or not the District Court's findings of fact are clearly erroneous. There are no important questions of federal law involved in this case.

I

THE NORRIS-LA GUARDIA ACT PROHIBITS THE GRANTING OF AN INJUNCTION IN A MAJOR DISPUTE UNDER THE RAILWAY LABOR ACT.

This case, involving a request for an improved pension plan, is clearly a major dispute as opposed to a minor dispute within the meaning of those terms as used under the Railway Labor Act. The Norris-LaGuardia Act applies to all Railway Labor Act major disputes. *Brotherhood of R. T.* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50. The requested change is specifically within the language of Section 13 (*c*)

of the Norris-LaGuardia Act 29 U. S. C. 113(c) defining a labor dispute as any controversy "concerning terms or conditions of employment".

Petitioner does not contend otherwise, stating only that the demands of the employees are not bargainable items under the Railway Labor Act. This Court has never held that a request for a change in an agreement could be enjoined because the demand was "non-bargainable". As this Court stated in *Telegraphers* v. *C. & N. W. R. Co.*, 362 U. S. 330, 338, the trend has been to broaden, not narrow, the scope of subjects about which workers or railroads may or must negotiate and bargain collectively.

Petitioner has cited no applicable cases and has ignored the Norris-LaGuardia Act. That Act is paramount in a major dispute. As this Court stated in *Marine Cooks & Stewards* v. *Panama S. S. Co.*, 362 U. S. 365, 369:

> "That Act's language is broad. The language is broad because Congress was intent upon taking the federal courts out of the labor injunction business. . . ."

The demand for a change being squarely within the wording of the Norris-LaGuardia Act, the Court of Appeals correctly affirmed the judgment below denying injunctive relief.

II.

THE NATIONAL MEDIATION BOARD DID NOT, AND COULD NOT, LEGALLY IMPOSE SUPERMEDIATION ON THE RESPONDENT UNIONS.

Petitioner's contention at this point is completely contrary to the record. It is clear, from that record that the National Mediation Board was not asserting any jurisdiction to impose a second mediation on the parties over the objections of the respondent unions. The Board so stated in its telegram of May 18 (App. 15, 16).

Petitioner's argument that the Mediation Board had the power to impose a second mediation without their consent is equally without merit. Such supermediation is contrary to the language of Section 5 First of the Railway Labor Act which states alternative methods by which mediation can be achieved, the first within the control of the parties or a party; the second within the control of the Board on its own initiative. In either event, the Board mediates and then proffers arbitration if unsuccessful. This procedure was exhausted. Petitioner's contention that the Mediation Board had the power to begin this procedure again would completely eliminate the necessity for the further power of the Mediation Board to recommend to the President of the United States that a Presidential Emergency Board should be appointed. The National Mediation Board itself denied it had such power in its *brief amicus* filed in *Telegraphers v. C. & N. W. R. Co.*, 362 U. S. 330, 338.

Petitioner's point is without merit.

III.

PENSION PLANS ARE BARGAINABLE ITEMS UNDER THE RAILWAY LABOR ACT.

Despite the fact that petitioner had previously bargained for two pension plans with the respondent unions, it continues to contend such plans are not bargainable items under the Railway Labor Act. No Railway Labor Act case is cited for this proposition. As this Court stated in *Telegraphers v. C. & N. W. R. Co.*, 362 U. S. 330, 338:

> "In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bar-

> gain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large."

This Supreme Court statement is squarely in point here since 24 of the 27 Class I, line haul railroads in the United States, employing 80% of all railroad employees, had pension plans which were supplementary to Railroad Retirement Act Benefits (App. 127, 128, Defendants' Exhibit 5). In addition, all of the other United States Steel railroads, with the exception of the petitioner and the D. M. & I. R., had pension plans in effect which were similar to II-CR requested by the defendants herein (App. 133-136). It is thus seen that there is a custom and practice to have such plans throughout the railroad industry, and a custom and practice to bargain for such plans on the railroads owned by steel companies.

Petitioner points out past history of unilateral institutions of pension plans in the railroad industry (P. B. 24) but ignores the fact that it negotiated two such previous agreements. Petitioner also ignores the fact that the last such pension agreement froze the "rates of pay" of the BRT insofar as the cost of any program of pension benefits were concerned (App. 378).

In such circumstances, petitioner has failed to point out any specific section of the Railway Labor Act which made unlawful the demands for an improved pension plan. *Telegraphers* v. *C. & N. W. R. Co.*, 362 U. S. 330, 338, 339. Petitioner had the burden of proof and was required to establish that the demands were unlawful. *Chicago, Rock*

Island v. Switchmen's Union, 2nd Cir., 292 F. 2d 61, 71. Since petitioner failed to do so, the Court of Appeals correctly held that the defendants did not violate any of the provisions of the Railway Labor Act.

IV.

NO QUESTION IS PRESENTED FOR THIS COURT ON ISSUES INVOLVING FINDINGS OF FACT WHICH THE COURT OF APPEALS REFUSED TO FIND CLEARLY ERRONEOUS.

Petitioner seeks to raise a question as to a supposed bargaining for retired persons. Petitioner also seeks to raise a question as to the awarding of attorneys' fees based on the wording of a bond which is nowhere to be found in the record. As to both of these items, the Court of Appeals decreed that the rulings of the trial court and its findings were not clearly erroneous.

No question is presented for the Court in such circumstances and it is obvious that there is no important question of federal law to be decided by this Court.

CONCLUSION.

Because of the applicable law and the demands of substantial justice, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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